Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

SAMUEL J. LYNAS,

Petitioner,

v.

GAYLE M. LYNAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the practice in this jurisdiction of the Court amending or altering a Judgment without notice to the parties violate the due process clauses in the United States Constitution?

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OPINIONS BELOW

The Opinion of the Court of Appeals, Fourth Appellate District, Division One, dated September 29, 1999 is unreported. (App. A.) The Findings and Order After Hearing of the Family Court, Superior Court of California, dated July 16, 1998, is also unreported. (App. B.)

STATEMENT OF JURISDICTION

The Supreme Court of California denied a timely Petition for Review on December 21, 1999. (App. C.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Fourteenth Amendments and 28 U.S.C. § 1257.

STATEMENT OF THE CASE

This was a dissolution of the marriage of the Petitioner and Respondent. This was a short marriage and Petitioner and Respondent had agreed on the division of property, therefore Petitioner represented himself in pro per. The trial of the Dissolution was heard on May 21, 1993 before Judge Thomas Ashworth III.

Respondent wanted to postpone the termination of the marriage despite the agreed property division. Consequently, Respondent did not appear at trial, even though she had been previously warned by the Court that she would not be granted

another continuance (5-21-93 trial trans. pp. 2 ll.3-28 & pp. 3 ll.1-15).

Consequently Respondent's mother retained an attorney solely for the purpose of requesting another continuance and the attorney was not to have any further involvement (5-21-93 trans. pp. 6 ll.9-16). The attorney stated that he knew nothing of any issues, that his appearance was for the purpose of a continuance only. The Respondent did not dispute the fact that the division of the property was more than fair (5-21-93 trans. pp. 3 ll.25-27).

Respondent's motion to continue was denied and the trial proceeded by way of default by Respondent (5-21-93 trans. pp. 6 ll-21-22).

Notwithstanding the fact that Petitioner was in pro per, he had filed a trial brief which set forth the among other things, that Petitioner would transfer his interest in the some real property in Oregon to Respondent, only if he was released from any liability to any lien, mortgage or other encumbrance on the property (Clk trans. pp. 0011 ll-4-8). The other property had been divided and transferred between the parties.

The Court admitted the trial brief into evidence (5-21-93 trans. pp. 8 ll-1-8).

The Court recited, on the record, that Petitioner was to transfer his interest in the Oregon property to Respondent on the condition that she become solely responsible for any indebtedness related to the property (5-21-93 trans. pp. 8 ll-13-18).

The Court a second time expressed, on the record, and referring to her responsibility for the debt, that Respondent would be awarded the Oregon property subject to any debt against it (5-21-93 trans. pp. 12 ll-20-22).

After announcing the provisions and conditions for the record, the Court directed Petitioner to hand write out the Judgment and give it to the bailiff and the Court would sign it (5-21-93 trans. pp. 13 ll-22-24) and would be filed as submitted because it was written exactly as the Judgment announced by the Court.

After handing the Judgment to the bailiff, Petitioner was excused, and left the Courtroom.

Title to the Oregon property was in Appellant's name because he had purchased it before marriage and it was his separate property (5-21-93 trans. pp. 10 ll-26-28).

Before the marriage he had obtained the down payment for the property from his mother (Clk trans. pp. 0027 ll-20-21).

Respondent also understood the terms of the Judgment to be that she could obtain title to the property only after Petitioner was released from any liability for the mortgage and indemnifying Petitioner and reimbursing him for any post separation mortgage payments.

Respondent continued to assure Petitioner that eventually she would be able to meet the conditions of the Judgment which would enable her to obtain the Oregon property (Clk trans. pp. 0026 ll-5-10).

After a considerable length of time, Petitioner realized that it was highly unlikely that Respondent would ever be able to obtain a mortgage and reimburse him. Consequently Petitioner retained counsel and brought a post-Judgment motion to modify the Judgment in order to enforce the terms and conditions of the Judgment; and compel Respondent either obtain a mortgage and reimburse Petitioner for post Judgment mortgage payments, or be precluded from claiming any interest in the property.

After deciding to bring the motion to modify Petitioner went to the Court file to obtain copies, and discovered, for the first time, that the handwritten Judgment he had submitted, after the trial, had been erroneously changed, by interlineation, transferring the Oregon property to Respondent and making him responsible for the encumbrances on the property.

Petitioner immediately suspected the Respondent of altering the Judgment, because she was considered capable of such. Furthermore the erroneous Judgment endowed her with an enormous and unreasonable benefit at his expense.

Because the erroneous interlineation contradicted the expressed intention of the Court and terms of the Judgment, it did not occur to Petitioner that such an erroneous alteration would be made by the Court; without any mention or notice to Petitioner.

The only notice the Petitioner received was that the Judgment (which he has written) had been entered. Petitioner did not receive any notice that the Judgment which Petitioner had submitted had been changed in any manner.

During a recess at the hearing on the motion to correct the Judgment nunc pro tunc 5-13-98 before Judge Alan Clements, the Judgment was shown to Judge Ashworth in the Court file. Judge Ashworth he admitted that he had made and initialed the change. But, the Judge offered no explanation of any circumstances or reason for the change being made, or why there was no record of the Petitioner ever being notified of any change. Because this happened five years ago the Judge could not be expected to recall the circumstances, particularly since there are so many pro per dissolutions.

Respondent, also believed the judgment as written by the Petitioner and submitted to the Court, was Judgment of the Court and recited the agreement of the parties.

Furthermore, the erroneous interlineation contradicts the Judgment rendered and announced by the Court, and contradicts the expressed intention of the Court, viz that Respondent would be awarded the Oregon property, subject to debt (5-31-93 trans. pp. 12 ll-18-22).

Nothing was even suggested to Petitioner to the contrary.

Additionally, Respondent's attorney, who was present at the trial, could not refer to anything to indicate that the Court was considering any Judgment other than the Judgment rendered during the trial which the Judge confirmed twice on the record.

Notwithstanding, Judge Clements who was assigned to hear the motion, denied the motion after reciting that the Court Order, in the transcript of the trial on 5-23-93, confirmed Petitioner's contention (5-13-98 trans.

pp. 7 ll-23-28 & pp. 8 11-1-5 & 11-20-22) and engaged in speculation as to why the erroneous alteration was made. After which he admonished Petitioner of the risk of self representation.

The trial was conducted on May 21, 1993 and Judgment entered on May 25, 1993. The motion to modify the Judgment was filed by Petitioner September 4, 1997 and was heard on May 13, 1998, and denial of the motion filed July 16, 1998. An appeal of the denial of the motion was filed September 10, 1998, in the Fourth District Court of Appeal, Division One. The Appellate Court filed an affirmation of the denial of the motion on September 29,1999. A Petition for Review in the California Supreme Court, followed.

REASONS FOR GRANTING THE WRIT

The Court of Appeal declined to consider the issue of due process. The opinion of the Court of Appeal, in allowing Courts to alter Judgments without notice, resulted in a rank injustice to the Petitioner an unreasonable windfall to the Respondent. The opinion does not account for the fact that the time and manner in which the trial court reviewed the Judgment is unknown. The Appellate Court on page 7 of the opinion presumes by speculation that the reason for the trial court altering the Judgment, was to accomplish a fair settlement. That speculation and presumption is totally without any supporting evidence in the record. In fact that speculation and presumption contradicts the announced Judgment and express intention of the trial court. How many other pro per Judgments the Court reviewed at the time this one was signed and the manner of review could not be ascertained five years later.

The mistaken interlineation resulting in an erroneous judgment of the trial court contradicts the only evidence in the trial transcript of the Court twice expressing the intention that the Judgment should be prepared to reflect the Court's intention that the award of the property was subject to any encumbrances.

The opinion of the Appellate Court omits the fact that the Judgment was not shown to Judge Ashworth to determine if he had written the interlineation until the hearing of Petitioner's motion to correct the Judgment had begun. Petitioner did not suspect that the Judge had made such a mistake by an erroneous interlineation, without any notice.

The Appellate Court overlooked the law which provides that a nunc pro tune order is appropriate to correct an erroneous Judgment to reflect the intention of the Court and the truth.

More important, the Appellate Court disregarded the issue of depriving Petitioner of property without due process of law.

It appears that the Court in reviewing the pro per Judgments before they were signed confused Petitioner's case with another one of the pro pers. The interlineation must have been a clerical error, and could not have been a deliberate result of judicial reasoning and determination. To impose the overwhelming burden of a $50,000 debt upon the Petitioner, who is a blue collar motorcycle mechanic is inconsistent with a fair division of the property, and contradicts the expressed intention of the court in rendering the Judgment.

The last time the Petitioner saw the Judgment, which he had written as directed by the Court, was when he submitted it to the Court bailiff and left the Court room. Petitioner had no reason to suspect any erroneous contradictory interlineation would be made by mistake.

Both Petitioner and Respondent believed the Judgment was, consistent with their agreement, as written by the Petitioner and submitted to the Court bailiff.

Respondent kept assuring Petitioner that she would obtain her own mortgage on the property and reimburse him for the payments which he had been making to preserve his credit. But, after a considerable time, it became evident that Respondent could not comply with the condition precedent to the property being transferred to her.

Furthermore, during the five year period, neither Respondent nor her attorney made any effort to transfer title to the property, until Petitioner brought the motion to modify the Judgment and the mistake in the Judgment was discovered.

Petitioner's evidence at the trial was unopposed by the attorney for the Respondent.

It is a fundamental concept of due process that Petitioner be given notice of such a drastic departure from the Judgment which he submitted before he is deprived of his right to indemnification from such a crushing obligation.

Petitioner's Petition for Review by the California Supreme Court was denied, but not by all of the Justices voted to deny the Petition.

Some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and is an opportunity which must be granted at a meaningful time and in a meaningful manner *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965).

The Constitution requires a meaningful opportunity to respond before a deprivation of property occurs *Brock v. Roadway Express*, 481 U.S. 252, 107 S. Ct. 1740 (1987).

The practise in this jurisdiction of allowing Judges to amend and/or alter Judgments without notice of any kind to the parties effected violates the Fifth and Fourteenth Amendments, and 28 U.S.C. § 1257, and is in conflict with many other jurisdictions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

That the Supreme Court of the State of California be directed to set aside the Judgment and to remand the case to the trial court for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA, DATED SEPTEMBER 29, 1999

COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

D032015

(Super. Ct. No. D340975)

In re the Marriage of GAYLE M. LYNAS and SAMUEL J. LYNAS.

GAYLE M. LYNAS,

Respondent,

v.

SAMUEL J. LYNAS,

Appellant.

APPEAL from an order of the Superior Court of San Diego County, Alan B. Clements, Commissioner. Affirmed.

Appendix A

In this dissolution action, Samuel J. Lynas[1] appeals from an order denying his motion for a nunc pro tunc modification of the judgment. We conclude Samuel failed to show the judgment contained any clerical error and accordingly affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gayle and Samuel married in March 1989 and separated in June 1990. Gayle petitioned for dissolution in March 1992. Both parties initially represented themselves.

A short cause trial was held on May 21, 1993, before Judge Thomas Ashworth III. Gayle did not appear and the court proceeded on a default basis.[2] She had requested in her petition that three cars and real property in Oregon be awarded to her. Samuel appeared and filed a brief stating: "All the community property has been divided except the Deerhorn Road property in Oregon. Husband will give up his ownership interest in that property if he is released from any liability to any lien, mortgage or other encumbrances on that property."

After Samuel's testimony, the court divided the couple's assets. It awarded Gayle, among other things, "the Oregon

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1. To avoid confusion, we refer to the parties by their first names.

2. An attorney appeared specially for Gayle to ask for a continuance due to a family illness. He explained Gayle was on disability and "very emotionally upset about the whole thing[.]" The court denied the request because Samuel objected and it had previously ruled there would be no additional continuances.

property, subject to any debt against it." The court noted Gayle was "getting what she's asking for." "She was asking for the Oregon property and the three cars, and that was all awarded to her. So even under her prayer, she's gotten what she says she wants."

The court required Samuel to prepare a judgment of dissolution. His handwritten attachment to the form judgment stated in relevant part:

> "The petitioner is awarded 1983 Honda Prelude, Datsun 310, 1959 Chevy El Camino, household furniture as community property, personal property in her possession, and real property located at 40692 Deerhorn Rd, Springfield, Oregan as separate property, as long as respondant [*sic*] is released from any liability to any lien, mortgage or other encumbrance on that property."

After Samuel left court, however, Judge Ashworth reviewed his proposed judgment and interlineated it to award the Oregon property to Gayle, with Samuel being responsible for any encumbrance. Judgment was entered on May 25, 1993.

Samuel continued to make payments on the Oregon property. In September 1997 Samuel, now represented by counsel, petitioned for modification of the judgment nunc pro tunc. He asserted he recently "discovered that [Gayle], or someone on her behalf, removed the attachment to the Judgment from the Court file, falsified the Judgment and forged the name of the Judge, who presided at the trial in an

attempt to remove the condition precedent to her acquiring any interest in the property[.]" Samuel apparently checked the judgment after being unable to sell the Oregon property due to Gayle's filing of a lis pendens.

In her response, Gayle declared that while Samuel had been making payments on the Oregon property, he had also been collecting rent from it. She denied tampering with the judgment and noted it appeared that Judge Ashworth made the interlineation and initialed it.

Samuel filed supplemental declarations stating he purchased the property before the marriage and "$23,000.00 is still owing for the money borrowed from my mother for a balloon payment which was necessary for the purchase of the property." He denied renting the property. Samuel claimed, "more than two years after the entry of the Judgment . . . , [Gayle] expressed her gratitude for my maintaining the Oregon property, and continuing the mortgage payments. [Gayle] said she was selling her home, and that she would reimburse me for the payments and expense, with interest. [¶] She said that she would obtain her own loan on the property."

A hearing was held on May 13, 1998. Gayle's counsel advised the court he and Samuel's counsel "did go and see Judge Ashworth. He was shown the file. His marshal came back out and stated to both of us that he did make the interlineations and the changes in that order and he initialed them." Samuel's counsel said, "That's correct, Your Honor. That is exactly what occurred."

Samuel argued the judgment should be modified because Judge Ashworth changed it "for unexplained reasons[.]" The court responded: "It's not unexplained because [Samuel's] proposal was not what Judge Ashworth ordered. What is crystal clear to me, . . . from doing this job for the last 10 years, at a default hearing where the court makes orders, those orders are then reduced to writing. They simply aren't rubber stamped by the clerk. They are checked by the court for accuracy of the order. That's what happened."

After reviewing the reporter's transcript from the may 21, 1993, trial, the court determined Judge Ashworth rejected Samuel's proposed judgment because it did not comport with the court's ruling and "is not enforceable as . . . far as creditors are concerned." The court refused to modify the judgment.

DISCUSSION

Samuel contends the court erred by refusing to correct "the clerical error made by mistake" by Judge Ashworth. He asserts: "It appears that [Judge Ashworth] in reviewing the pro per Judgments before they were entered confused [Samuel's] case with another one of the pro pers. The interlineation could not have been a deliberate result of judicial reasoning and determination."[3]

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3. Samuel claims the Oregon property had a $50,000 encumbrance, but he submitted no such evidence to the trial court. "[I]t is not proper practice on appeal to refer in briefs to circumstances not established by the record. [Citations.]" (*Davis v. Thayer* (1980) 113 Cal.App.3d 892, 912.)

Appendix A

"A court of general jurisdiction has the power, after final judgment, and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the clerk, counsel or the court itself, so that the records will conform to and speak the truth. [Citations.]" (7 Witkin, Cal. Procedure (4th ed. 1997) § 69, p. 597; Code Civ. Proc., § 473, subd. (d).) "[C]lerical errors do not include those made by the court because of its failure to correctly interpret the law or apply the facts. [Citations.] It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can be reached by a corrective nunc pro tunc order." (Estate of Ekstrom (1960) 54 Cal.2d 540, 545.)

Samuel submitted no evidence suggesting the final judgment contained a clerical error. Judge Ashworth advised that he had made the interlineation, and Samuel failed to call him to testify to any intention other than that appearing from the judgment. (*Estate of Ekstrom, supra*, 54 Cal.2d at p. 548.) "The order made is presumed to be that intended in the absence of contrary evidence (citation], and the fact of [any] error alone cannot rebut that presumption. In view of the foregoing it must be deemed conclusive that [any] clerical error is judicial in nature, and that the judgment as originally made is that intended to have been made." (*Estate of Ekstrom, supra*, 54 Cal.2d at p. 548.)

We may presume that Judge Ashworth awarded Gayle the Oregon property without any encumbrance in an effort to balance the distribution of assets. However, even if the award was unsupported by the facts, as Samuel claims, he

failed to show the judgment was not that intended by the court.[4]

DISPOSITION

The order is affirmed. Samuel is to pay Gayle's costs on appeal.

s/ Huffman
HUFFMAN, Acting P.J.

WE CONCUR:

s/ Nares
NARES, J.

s/ Haller
HALLER, J.

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4. We also reject Samuel's argument his due process rights were violated because the court did not send him a copy of the judgment. The case he cites concerns the impropriety of the entry of a default judgment absent adequate notice and the opportunity to be heard. (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166.) Samuel was notified of and appeared at trial before entry of judgment. He could have easily obtained a copy of the judgment.

APPENDIX B — FINDINGS AND ORDER AFTER HEARING DATED AND FILED JULY 16, 1998

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

FAMILY COURT

* * *

1. This proceeding was heard on *(date)*: May 13, 1998 at *(time)*: 8:30 a.m. in Dept. F-4

* * *

8. Other orders: ☒ As attached

* * *

Date: JUL 16 1998

s/ Alan B. Clements
JUDGE OF THE SUPERIOR COURT
ALAN B. CLEMENTS
COMMISSIONER

Appendix B

PETITIONER: GAYLE M. LYNAS

RESPONDENT: SAMUEL J. LYNAS

ATTACHMENT TO ITEM 8 OF FINDINGS AND ORDER AFTER HEARING

CASE NO. D340975

The attorneys requested Judge Ashworth review the Judgment signed on May 21, 1993 to determine whether the judge himself made the interlineations and modifications or some other person did. Judge Ashworth reviewed the original court file, specifically the Judgment, and stated that he personally made the interlineations and modifications to the Judgment and initialed and signed it.

After a full hearing on the matter, the Motion to correct, amend or modify the original judgment was denied and the request for attorney fees was also denied.

The property in Oregon is judged to be the sole and separate property of the Petitioner, and the Respondent is responsible for the mortgage liens on the property. Respondent shall Quitclaim the property to Petitioner as originally ordered.

APPENDIX C — ORDER DENYING PETITION FOR REVIEW OF THE SUPREME COURT OF CALIFORNIA EN BANC, FOURTH APPELLATE DISTRICT, DIVISION ONE DATED DECEMBER 21, 1999

Fourth Appellate District, Division One,
No. D032015 S083459

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

In Re the Marriage of GAYULE M. AND
SAMUEL J. LYNAS

GAYLE M. LYNAS,

Respondent

v.

SAMUEL J. LYNAS,

Appellant

Petitiion for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

s/ GEORGE
Chief Justice